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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 358

O. A. KYLE,

Petitioner,

vs.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES E. DIEBKER,
JOHN E. MARSHALL,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Opinions below	2
Statutes and regulations involved	2
Question presented	2
Statement of the case	2
Specifications of errors to be urged	4
Reasons for granting writ	4
Conclusion	5
Brief in support of petition	6
I. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Second Circuit in *Seeley* v. *Commissioner of Internal Revenue,* 186 Fed. (2d) 541	6
II. The decision of the Court of Appeals is in conflict with decision of the Court of Appeals for the Fourth Circuit in *Myers* v. *Commissioner of Internal Revenue,* 180 Fed. (2d) 969	7
III. The decision of the Court of Appeals is in conflict with decision of the Court of Appeals for the Fifth Circuit in *Swenson* v. *Thomas,* 164 Fed. (2d) 783	7
Appendix—Applicable statutes	10

Table of Cases Cited

Myers v. *Commissioner of Internal Revenue,* 180 Fed. (2d) 969	4, 7, 9
Seely v. *Commissioner of Internal Revenue,* 186 Fed. (2d) 541	4, 6, 9
Swenson v. *Thomas,* 164 Fed. (2d) 783	4, 7, 9

Statute Cited

Judicial Code, Section 240 (a), as amended by Act of Feb. 13, 1925, 43 Stat. 938	1

OTHER AUTHORITIES

	Page
Internal Revenue Code, Section 116 (a)	2, 4, 10
Revenue Act of 1942	10
Treasury Regulations 111, Section 29.116-1 (as amended by T.D. 5373)	4, 8, 11
Treasury Regulations 111, Section 29.211-2, 29.211-4 and 29.211-5	14
Treasury Regulations 111, Section 29.116-1	4
Treasury Regulations 111, Sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5	4, 13, 14
Treasury Regulations 111, Section 29.211-2	12
Treasury Regulations 111, Sections 29.211-1 to 29.211-5	14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

O. A. Kyle, by his attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered July 9, 1951 (R. 57), reversing the judgment of the District Court of the United States for the Western District of Oklahoma entered October 3, 1950 (R. 15).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Opinions Below

The Findings of Fact and Conclusions of Law of the District Court are printed at pages 12 to 15 of the Record.

The opinion of the Court of Appeals, reversing the judgment of the District Court, entered October 3, 1950 (R. 57), was handed down July 9, 1951 and is printed at pages 57 to 63 of the Record and reported in — Fed. (2) —.

The dissenting opinion of Judge Orie L. Phillips of the Court of Appeals, is printed at pages 63 to 66 of the Record, and reported in — Fed. (2) —.

Statutes and Regulations Involved

The pertinent statutes and regulations are printed in the Appendix, *infra.*

Question Presented

Was the salary earned by O. A. Kyle, while working in Saudi Arabia during the taxable year 1945, exempt from taxation under Section 116(a) of the Internal Revenue Code?

Statement of the Case

Kyle is a citizen of the United States (R. 41), married (R. 30), and his home in 1944 was in Oklahoma City (R. 20). He is a pipe fitter and oil well driller (R. 20).

In the year 1944, while at San Francisco, Kyle signed an employment agreement to work for Compania Construction Bechtel-McCone, S. A., a South American corporation (R. 35 to 40), in Saudi Arabia, for a period of 18 months, as a pipe fitter or in such other capacity as his employer might require at a salary of $450 per month on the basis of 48 hours per week with the privilege of working overtime and receiving overtime pay, the employer furnishing him free meals and sleeping accommodations (R. 35 to 40).

DARK PAGE

Kyle signed a passport application at San Francisco on July 20, 1944, stating therein his intent to return to the United States within 18 months, and it was issued to him on August 29, 1944, with the expiration date stamped thereon—March 1, 1945—by the passport agent (R. 41 to 43). After the expiration date of March 1, 1945, and on September 17, 1945, upon Kyle's application, his passport was extended 11 months—until August 29, 1946 (R. 45 to 48).

After signing the employment agreement and obtaining his passport, Kyle left his wife in the United States (R. 30), and landed in Saudi Arabia sometime in December, 1944 (R. 20); and he was in Saudi Arabia during the entire year 1945 (R. 20) and a part of the year 1946 (R. 21). He returned to the United States on May 28, 1946 (R. 49). While in Saudi Arabia, Kyle worked in building a refinery at Tanura and a stabilization plant at Dhahran (R. 21), which were being constructed by the South American corporation for the Standard Oil Company of New Jersey (R. 25). Kyle worked overtime and received overtime pay (R. 26).

When Kyle signed his employment contract, he had in mind working in Saudi Arabia for a year or two or three "to save enough money to come home and secure myself for the rest of my life" (R. 21). When Kyle left, he had "in mind staying over there" three years (R. 21). On May 10, 1945, because of a change in personnel, Kyle decided to return to the United States (R. 21, 22). Up to that time, while in Saudi Arabia, he had intended to stay longer than 18 months (R. 22); and on September 15, 1945, he caused his passport to be extended beyond 18 months (R. 45, 48). Kyle had been told at San Francisco that he could work for the Standard Oil Company of New Jersey after he had completed his employment with the South American corporation, and "they tried to hire me over there. They tried to get me to stay" (R. 25).

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Kyle saved his earnings while in Saudi Arabia, around $12,000 except $100 per month allotted to his wife (R. 22). He returned to the United States with savings of a little better than $10,000 (R. 22), which he invested in a stock farm (R. 25, 26). Kyle now makes his home on that farm, and works in the oil fields when he can get employment (R. 25).

Specifications of Errors to Be Urged

1. The court below erred in applying an erroneous legal test in reaching the conclusion that Kyle was not a bona fide resident of Saudi Arabia throughout the taxable year 1945 within the intent and meaning of Section 116 (a) of the Internal Revenue Code.

2. The court below erred in failing to adopt and follow the legal test, for determining whether Kyle was a bona fide resident of Saudi Arabia during the taxable year 1945, provided by Treasury Regulations 111, Section 29.116-1 as amended by T. D. 5373, and Sections 29.211-2, 29.211-4 and 29.211-5.

3. The court below erred in reversing the judgment of the trial court that Kyle was a bona fide resident of Saudi Arabia during the taxable year 1945, and that his earnings in Saudi Arabia in 1945 were exempt from taxation.

Reasons for Granting Writ

The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Second Circuit in *Sceley* v. *Commissioner of Internal Revenue,* 186 Fed. (2) 541; with the decision of the Court of Appeals for the Fourth Circuit in *Myers* v. *Commissioner of Internal Revenue,* 180 Fed. (2) 969, and with the decision of the Court of Appeals for the Fifth Circuit in *Swenson* v. *Thomas,* 164 Fed. (2) 783.

Conclusion

Certiorari should be granted.

CHARLES E. DIERKER,
510 First National Building,
Oklahoma City, Oklahoma.

JOHN E. MARSHALL,
712 Commerce Exchange Building,
Oklahoma City, Oklahoma.
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

I

The Decision of the Court of Appeals Is in Conflict with the Decision of the Court of Appeals for the Second Circuit in Seeley v. Commissioner of Internal Revenue, 186 Fed. (2) 541.

The question before the Court of Appeals for the Second Circuit in *Seeley* v. *Commissioner of Internal Revenue,* 186 Fed. (2) 541, was whether salary earned by Seeley while working in England and Sweden with occasional trips home, during the years 1943 and 1944, was exempt from taxation under Section 116 (a) of the Internal Revenue Code; and that court ruled it was.

Seeley was "managing director" of a Swedish affiliate of the General Motors Overseas Operations; and during the years 1943 and 1944, his wife lived in an apartment in Manhattan, New York, while Seeley was working in London and Stockholm, except for trips home. He paid no income taxes either to England or to Sweden. The Court of Appeals rested its decision squarely upon the regulations, as follows:

> "As we have said, the statute (Section 116 (a)) is one in which the regulations are especially authoritative, because they serve to implement a purpose, not set forth in detail. Section 29.116-1 of Regulations 111 declares: 'Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5 relating to what constitutes residence or non-residence * * * in the United States in the case of an alien individual.' Of the sections so incorporated the first—Section 29.211-2—declares that a man's intentions determine whether he is a 'resident' or a 'transient'; and that one who is present without any 'definite intention as to his stay' is a resident;

though he is not, if he has a 'definite purpose which in its nature may be promptly accomplished.' On the other hand, when an extended stay may be necessary to accomplish his purpose, 'he becomes a resident,' if 'he makes his home temporarily' where he has gone."

II

The Decision of the Court of Appeals Is in Conflict with the Decision of the Court of Appeals for the Fourth Circuit in Myers v. Commissioner of Internal Revenue, 180 Fed. (2) 969.

The question before the Court of Appeals for the Fourth Circuit in *Myers* v. *Commissioner of Internal Revenue,* 180 Fed. (2) 969, was whether salary earned by Myers while working in the British West Indies, during the year 1943, was exempt from taxation under Section 116 (a) of the Internal Revenue Code; and that court ruled it was.

Myers arrived in Nassau from New York on May 19, 1942, and was engaged as a construction engineer in the Bahamas until March, 1944. In disposing of the case, the Court of Appeals said:

"Regulations 111, Section 29.211-2 of the Commissioner of Internal Revenue makes a distinction between (1) a mere transient or sojourner and (2) a resident. Under the regulation, petitioner, to come within the exemption statute, must be a resident, not a transient or sojourner. Hardly, under the facts of the case before us, could petitioner be called a mere *transient or sojourner* in the Bahamas during 1943; he clearly, under the Regulation, was a bona fide *resident.*"

III

The Decision of the Court of Appeals Is in Conflict with the Decision of the Court of Appeals for the Fifth Circuit in Swenson v. Thomas, 164 Fed. (2) 783.

The question before the Court of Appeals for the Fifth Circuit in *Swenson* v. *Thomas,* 164 Fed. (2) 783, was

whether the salary earned by Swenson while working in Colombia, South America, during the years 1943 and 1944, was exempt from taxation under Section 116(a) of the Internal Revenue Code; and that court ruled it was.

Swenson had his domicile in Texas, and was engaged in geophysical work for Geophysical Service, Inc. "* * * on August 28, 1941, he entered into a written contract with his employer to enter its foreign service for three years, for a salary, a bonus and living expenses while outside the United States. The agreement was terminable by either party on thirty days' notice. He was sent soon after to prospect for oil in Colombia, South America, in charge of a crew of laborers often numbering two hundred men. His time was mostly spent in the forests and jungles. He served the full three years there without returning to the United States, and was then asked, and consented, to extend the contract for another year. He was thus living in Colombia for the whole of four years, and during the whole of 1943 and 1944. He expected all the time to return to the United States when the work was done, and in his application for passport stated he expected to return in three years. He paid income taxes while in Colombia to that government. No income taxes had been required of him by the United States while he was in foreign service until this controversy arose."

The Court of Appeals for the Fifth Circuit adverted to the change in the language of Section 116(a) made by the Revenue Act of 1942, and said, after this change, Treasury Regulations 111, Sec. 29.116-1 was promulgated which directed that in general bona fide foreign residence should be determined by the principles laid down in Sections 29.211-1 to 29.211-5 as to residence by aliens in the United States.

The trial court in the instant case held that Kyle was a bona fide resident of Saudi Arabia during the year 1945, and

that his salary there earned in that year was exempt from taxation. The opinion of the Court of Appeals, reversing the trial court, says Kyle was not a bona fide resident of Saudi Arabia within the intent and meaning of Section 116(a) of the Internal Revenue Code. The Court of Appeals did not apply the test found in Regulation 111, Section 29.211-2, as did the Courts of Appeal in the Second, Fourth and Fifth Circuits in *Seeley* v. *Commissioner of Internal Revenue,* 186 Fed. (2) 541, *Myers* v. *Commissioner of Internal Revenue,* 180 Fed. (2) 969, and *Swenson* v. *Thomas,* 164 Fed. (2) 783. Said court applied a test of its own choosing: that because Kyle lived in temporary barracks and ate meals furnished by his employer; did not take his wife with him; did not pay any taxes to Saudi Arabia, and did nothing to identify himself with the customs and habits of that country or to assimilate himself even casually into its life or society, Kyle was not a bona fide resident of Saudi Arabia. Chief Judge Phillips wrote a dissenting opinion in which he properly followed the Courts of Appeal for the Second, Fourth and Fifth Circuits.

Counsel for petitioner certify that in their opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

CHARLES E. DIERKER,
510 First National Building,
Oklahoma City, Oklahoma;

JOHN E. MARSHALL,
712 Commerce Exchange Building,
Oklahoma City, Oklahoma,
Counsel for Petitioner.

APPENDIX

Internal Revenue Code:

SEC. 116 (as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148(a), and the Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 107(b)). EXCLUSIONS FROM GROSS INCOME. In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income from Sources Without the United States.—

(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * *

(3) Definition of earned income.—For the purposes of this subsection, "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable

allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 116.)

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

* * * * * * *

(c) Gross Income from Sources Without United States.—The following items of gross income shall be treated as income from sources without the United States:

* * * * * * *

(3) Compensation for labor or personal services performed without the United States;

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 119.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SECTION 29.116-1 (As amended by T. D. 5373, 1944 Cum. Bull. 143). Earned Income from Sources Without the United States.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income; (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) such income would constitute earned income as defined in section 25(a) if received from sources within the United States for taxable years beginning before January 1, 1944, or as defined in section 116(a) (3) for taxable years beginning after December 31, 1943; and (d) such income does

not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5, relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * * * *

SEC. 29.211-2. Definition.—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and
(b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in

the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

SEC. 29.211-3. Alien Seamen, When to be Regarded as Residents.—

* * * * * * *

SEC. 29.211-4. Proof of Residence of Alien.—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or per-

sons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211-5. Loss of Residence by Alien.—An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	6
Conclusion	13
Appendix	14

CITATIONS

CASES:

Commissioner v. *Fiske's Estate*, 128 F. 2d 487, certiorari denied, 317 U. S. 635 9
Commissioner v. *Swent*, 155 F. 2d 513, certiorari denied, 329 U. S. 801 9
Downs v. *Commissioner*, 166 F. 2d 504, certiorari denied, 334 U. S. 832 ..... 8, 12
Glascock v. *Commissioner*, decided September 28, 1948 12
Myers v. *Commissioner*, 180 F. 2d 969 ..... 6, 11
Seeley v. *Commissioner*, 186 F. 2d 541 ..... 6, 10
Swenson v. *Thomas*, 164 F. 2d 783 ..... 6, 11
Weeks v. *Commissioner*, 16 T. C. 248 12

STATUTES:

Internal Revenue Code:
Sec. 116 (26 U. S. C. 1946 ed., Sec. 116) 8, 9, 14
Sec. 119 (26 U. S. C. 1946 ed., Sec. 119) 16
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 213 9
Revenue Act of 1951, 82d Cong., 1st Sess., Sec. 321 12

MISCELLANEOUS:

67 Cong. Record, Part 4, p. 3781 9
G. C. M. 9848, X-2 Cum. Bull. 178 (1931) 9
G. C. M. 22065, 1940-1 Cum. Bull. 100 9
H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364) 9
1 Hearings Senate Committee on Finance, on H. R. 7378, 77th Cong., 2d Sess., p. 743 9
H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320) 9
S. M. 5446, V-1 Cum. Bull. 49 (1926) 9
S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348) 9
S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54-55, 116 (1942-2 Cum. Bull. 504, 548-549, 591) 10

Treasury Regulations 111:
Sec. 29.116-1 16
Sec. 29.211-2 ..... 6, 8, 18
Sec. 29.211-3 19
Sec. 29.211-4 19
Sec. 29.211-5 20

In the Supreme Court of the United States

October Term, 1951

No. 358

O. A. KYLE, *Petitioner*

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 6-12) is reported at 92 F. Supp. 600. The opinion of the Court of Appeals, one judge dissenting (R. 57-66) is reported at 190 F. 2d 353.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1951. (R. 57.) Petition for rehearing was denied August 13, 1951. (R. 68.) The petition for a writ of certiorari was filed on Sep-

tember 27, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below correctly held that during the taxable year 1945 taxpayer was not a bona fide resident of Saudi Arabia within the meaning of Section 116 (a) of the Internal Revenue Code and, accordingly, that the income he earned in Saudi Arabia in 1945 is not exempt from taxation.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 14-21.

STATEMENT

O. A. Kyle (hereinafter called the "taxpayer"), a citizen of the United States residing in Oklahoma, was employed in Saudi Arabia during the taxable year 1945 and earned $7,016.93, which he reported as taxable income and on which he paid income tax of $923.22. He subsequently filed a claim for refund of the tax, with interest, claiming that during the entire taxable year he was a bona fide resident of Saudi Arabia and that the income he earned in that country was accordingly exempt from tax under Section 116 (a) of the Internal Revenue Code. After the expiration of six months, during which time the Commissioner had taken no action on the claim for refund, taxpayer instituted suit for refund. (R. 13-15.)

The facts found by the District Court on the issue raised as to taxpayer's residence in Saudi Arabia (R. 13-14), together with additional facts reflected by taxpayer's testimony and the documentary evidence, are as follows:

Taxpayer is a pipe fitter by trade, married and the father of adult children. In order to accumulate money to buy a farm in Oklahoma, he entered into a contract in 1944 with Compania Constructora Bechel-McCone, S. A., of Rio de Janeiro, a foreign corporation (hereinafter called the "Company") to go to Saudi Arabia to work at his trade. The Company was engaged in the construction of a refinery at Tanura, Saudi Arabia, and of a stabilization plant at Dhahran, Saudi Arabia. (R. 13-14.) Taxpayer's contract of employment (R. 35-40) was for a period of 18 months at a salary of $450 a month, with an opportunity to work overtime. The contract provided that upon completion or termination of his service under the contract he must depart from the zone of operations of the Company on the date specified by the Company. (R. 37.) However, taxpayer assumed that he could work longer in Saudi Arabia if he desired to remain and he intended to stay three years. He never intended to make that country his home and did not attempt to do so. He arrived in Saudi Arabia in December, 1944, where he remained and worked under his contract the entire year 1945 and until May, 1946, when a

change in personnel caused him to desire to sever his relation with his employer and, not being able to obtain suitable other employment in Saudi Arabia, he returned to Oklahoma and bought and stocked a farm with the money he had earned under his contract. (R. 13.)

The Company paid taxpayer's passage to and from Saudi Arabia and arranged for and took care of the details of application for his passport. (R. 13.) His passport application stated that he intended to return to the United States in 18 months. (R. 43.) The passport was issued on August 29, 1944, and on September 17, 1945, taxpayer applied for and received an extension of the passport for 11 months until August 29, 1946. (R. 45-48.) The Company "stripped" him of his passport upon his arrival in Saudi Arabia and he did not see it again until he left there to come back home. (R. 30.)

The employment contract required taxpayer to comply with and abide by all regulations governing employees' movements outside of the "construction area" designated and determined by the Company and stated that it was understood that trips outside of the "construction area" would of necessity be rigidly restricted and controlled and determined by the Company. Under the contract taxpayer also was not to engage, directly or indirectly, in any other employment, service or business whatever, nor take part in local politics. (R.

35.) As an actual fact, taxpayer did what the Company said to do (R. 28) and there was nothing to do except work. (R. 26.)

The contract of employment stated that while taxpayer was in the "Zone of Operations" (meaning Ras Tanura, Saudia Arabia, and any other locality in Saudi Arabia or around the Persian Gulf to which taxpayer might be transferred for service) the Company would furnish him free meals and sleeping accommodations through available facilities which he was required to accept and utilize. (R. 35.) He lived in temporary frame barracks provided by the Company and the Company also provided all of his meals during his employment. (R. 14.) He lived with 700 or 800 other Americans in the barracks, in the Company's zone of operations which he was not free to leave, and it was "just like a little piece of America transported to Saudi Arabia". (R. 28.) Taxpayer made no effort to take his wife with him to Saudi Arabia. She remained in Oklahoma City, Oklahoma. (R. 14.)

Taxpayer's salary, except for $50 a month which was paid to him in Saudi Arabia, was retained in the United States, $100 a month being allotted to his wife and the remainder being deposited to his credit in a bank by the Company. (R. 14.)

Taxpayer paid no taxes to the Government of Saudi Arabia. (R. 14.) The only money he spent while there was for payment of contributions as-

sessed by the Company for Government (Arabian) hospitals and for entertainment. (R. 22.)

The District Court held that taxpayer was a bona fide resident of Saudi Arabia during 1945. (R. 6-12.) This holding was based on the mere fact that taxpayer "constantly lived and worked at his job in Arabia throughout the taxable year 1945", the District Court being of the opinion that taxpayer's living there and being actually physically present was sufficient to make him a bona fide resident of Saudi Arabia within the meaning of Section 116(a) of the Code and thus exempt from tax the income he earned in Saudi Arabia. (R. 12.) The Court of Appeals reversed (R. 58-63), with one judge dissenting. (R. 63-66.)

ARGUMENT

As grounds for the granting of the writ, taxpayer asserts that the decision below is in conflict with *Seeley* v. *Commissioner,* 186 F. 2d 541 (C. A. 2d), *Myers* v. *Commissioner,* 180 F. 2d 969 (C. A. 4th), and *Swenson* v. *Thomas,* 164 F. 2d 783 (C. A. 5th). (Pet. 4; Br. 6-9.) It is further asserted that the court below did not apply Treasury Regulations 111, Section 29.211-2 (Appendix, *infra,* pp. 18-19) to determine the taxpayer's residence, but, instead, "applied a test of its own choosing". (Br. 9.) Neither of these assertions is correct.

The court below clearly did apply Section 29.211-2 of the Regulations (hereinafter called

the "Regulation"). The court quoted the Regulation in full and obviously deemed it controlling. (See R. 59.) The court's determination that taxpayer was not a bona fide resident of Saudi Arabia during 1945 was plainly based upon taxpayer's intentions with regard to the length and nature of his stay in Saudi Arabia (R. 60-61), as required by the Regulation, and the court's ultimate conclusion that he was not a bona fide resident of Saudi Arabia was in part stated in terms of the specific criteria set forth in the Regulation. For example, with reference to that part of the Regulation stating that a person is a resident if he lives in a country and has no definite intention as to his stay, the court below stated, properly, that taxpayer "did not go there for an indefinite or undetermined period". (R. 61.) Similarly, with reference to that part of the Regulation stating in effect that a person is not a transient in a foreign country merely because he has a floating intention, indefinite as to time, to return to the United States, the court below properly stated that taxpayer "did not go on the basis of a mere floating intention, indefinite as to the time of his stay there or indefinite as to the time of his return to the United States". (R. 61.)

Concededly, the court below necessarily rejected the theory, apparently entertained by the District Court (see R. 9), that under the Regulation mere presence in a foreign country is sufficient to con-

stitute residence there. The court below admittedly took into consideration facts repudiating any notion that taxpayer made a temporary home in Saudi Arabia in the sense of taking any part in the customs, habits and life of the country. This is in accord with the Regulation which specifically provides that whether a person is a transient is determined by his intentions with regard to the length and "nature" of his stay. The Regulation also states that one who comes to a foreign country for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and "to that end" he "makes his home temporarily" in the country, he becomes a resident. Thus, as the Ninth Circuit stated in *Downs* v. *Commissioner,* 166 F. 2d 504, 508, certiorari denied, 334 U. S. 832, the Regulation unquestionably is drawn with the understanding that unless the United States citizen abroad "makes his home temporarily" in the foreign country, that is, "identifies himself in some degree with its customs and lives under and within such customs", he is not a resident of the foreign country in which he is staying temporarily. Appendix, *infra,* p. 18). This is in accord with the purpose of the exemption statute, Section 116 (a), as stated by Senator George, Chairman of the Sen-

ate Committee on Finance.[1] Senator George explained that it was intended to amend the statute so that a nonresident American citizen who establishes a home, maintains his establishment, and takes on corresponding obligations of the home in any foreign country may enjoy the exemption and so that technicians, American citizens who are merely temporarily away from home, could be properly reached for tax purposes. 1 Hearings before Committee on Finance, United States Senate, on H. R. 7378, 77th Cong., 2d Sess., p. 743; see

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[1] As the decision below reflects (R. 59), we are here concerned with Section 116 (a) of the Code as amended in 1942 by Section 148(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798. The prior law commencing with Section 213 (b)(14) of the Revenue Act of 1926, c. 27, 44 Stat. 9, exempted from tax the earned income from sources outside the United States of a citizen of the United States who was a "bona fide nonresident" of the United States for more than six months of the taxable year. The purpose of the exemption was to increase foreign trade by benefiting those employed abroad in selling merchandise of the United States. H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320); cf. S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348); H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364). A citizen was considered a bona fide nonresident of the United States within the meaning of the law if he was physically absent from the United States for more than six months of the taxable year. See 67 Cong. Record, Part 4, p. 3781; *Commissioner* v. *Fiske's Estate*, 128 F. 2d 487 (C. A. 7th), certiorari denied, 317 U. S. 635; *Commissioner* v. *Swent*, 155 F. 2d 513 (C. A. 4th), certiorari denied, 329 U. S. 801; S. M. 5446, V-1 Cum Bull. 49 (1926); G. C. M. 9848, X-2 Cum. Bull. 178 (1931); G. C. M. 22065, 1940-1 Cum. Bull. 100.

also, S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54-55, 116 (1942-2 Cum. Bull. 504, 548-549, 591).

The interpretation of the Regulation adopted by the court below is not in conflict with the interpretation of the Regulation in the *Seeley, Myers* and *Swenson* decisions. Those cases did not involve situations where, as here, the taxpayer did not in any way or degree identify himself with the customs and life of the foreign country or live under and within such customs. Accordingly, it was unnecessary for the courts in those cases to discuss such a situation and they did not do so.

In the *Seeley* case (186 F. 2d 541) the Second Circuit stated that, under the Regulation, where an extended stay may be necessary to accomplish the taxpayer's purpose he becomes a resident "if" he makes his home temporarily where he has gone (p. 544). The holding that Seeley had been a bona fide resident of England was based on two criteria provided in the Regulation—(1) that he had no definite intention as to his stay in England and (2) that, assuming his purpose had been definite, it was of such a nature that an extended stay might be necessary for its accomplishment and to that end he made his home temporarily in London. The court stated (p. 544) that making a temporary home in a foreign country does not mean the acquisition of a domicile, but it obviously considered that more than mere presence in a foreign country during the entire taxable year is necessary.

The most significant facts in the *Myers* case (180 F. 2d 969) were that Myers intended to stay in the Bahamas for an indefinite period of time and even brought his family there. The Fourth Circuit concluded that, under the facts of the case, Myers could hardly be called a mere transient or sojourner; that he clearly, under the Regulation, was a bona fide resident. The decision can hardly be construed as applying an interpretation of the Regulation different from that applied by the court below.

The *Swenson* case (164 F. 2d 783) involved a person, apparently unmarried, who went to Colombia to work for an American concern for three years and stayed four years. The Fifth Circuit's decision that he was a bona fide resident of Colombia while there was based upon the statement that "his continuous and unbroken living there for four years was 'residence' " (p. 784). The court referred to that part of the Regulation expressly relating to making a "home temporarily" in the foreign country (pp. 784-785) and stated that making a "home temporarily" does not necessarily mean buying a house or changing domicile; that it means "no more than living there" (p. 785). Normally, "living" in a country presumes assimilation in some degree to the customs and life of the country and Swenson even paid income taxes to the Colombian Government. The Fifth Circuit did not say that mere presence in a foreign country

constitutes residence there and the decision accordingly presents no clear conflict with the decision below.

The instant case is simply one in which, on the facts, the court below reached a conclusion different from that reached in the *Seeley, Myers* and *Swenson* cases. The facts (see Statement, *supra,* pp. 3-6) preclude a conclusion that he made a temporary home in Saudi Arabia as a country. He was maintained and rigidly controlled by his employer while there and his situation was similar to that of the taxpayer in *Downs* v. *Commissioner,* 166 F. 2d 504 (C. A. 9th), certiorari denied, 334 U. S. 832, who worked for Lockheed Aircraft Corporation on construction projects in the British Isles and Northern Ireland and was held not to have been a bona fide resident of a foreign country or countries during the taxable year 1943. See also, *Glascock* v. *Commissioner,* decided September 28, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,182); and *Weeks* v. *Commissioner,* 16 T. C. 248.[2]

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[2] The importance of the proper interpretation of Section 116(a), as it read during the period in issue in this case, is reduced by the fact that Section 321 of the recently enacted Revenue Act of 1951 (Public Law ...., 82nd Cong., 1st Sess., approved October ...., 1951) further amends Section 116(a).

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
HELEN GOODNER,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

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APPENDIX

Internal Revenue Code:

SEC. 116 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a), and the Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 107 (b)]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income from Sources Without the United States.*—

(1) *Foreign resident for entire taxable year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts ex-

cluded from gross income under this subsection.

* * * * *

(3) *Definition of earned income.*—For the purposes of this subsection, "earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 116.)

SEC. 119. INCOME FROM SOURCES WITHIN THE UNITED STATES.

* * * * *

(c) *Gross Income from Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * *

(3) Compensation for labor or personal services performed without the United States;

* * * * *

(26 U. S. C. 1946 ed., Sec. 19.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116-1 [as amended by T. D. 5373, 1944 Cum. Bull. 143]. *Earned Income from Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United

States; (c) such income would constitute earned income as defined in section 25 (a) if received from sources within the United States for taxable years beginning before January 1, 1944, or as defined in section 116 (a)(3) for taxable years beginning after December 31, 1943; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5, relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * *

SEC. 29.211-2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United

States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

SEC. 29.211-3. *Alien Seamen, When to be Regarded as Residents.*—

* * * * *

SEC. 29.211-4. *Proof of Residence of Alien.* —The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or show-

ing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an exended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1)(c) or (2)(c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211-5. *Loss of Residence by Alien.*— An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention

to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

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